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15
16 **IN THE UNITED STATES DISTRICT COURT**
17 **FOR THE NORTHERN DISTRICT OF CALIFORNIA**

18
19 STATE OF CALIFORNIA, *et al.*,
20 Plaintiffs,
21 v.
22 MICHAEL REGAN¹, as the Administrator of
23 the United States Environmental Protection
24 Agency, *et al.*,
25 Defendants,
26 and
27 STATE OF GEORGIA, *et al.*,
28 Defendant-Intervenors.

Case No. 3:20-cv-03005-RS

**DEFENDANTS' MOTION TO
CONTINUE STAY**

Action Filed: May 1, 2020

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30 ¹ EPA Administrator Michael Regan is automatically substituted for Andrew Wheeler, and
31 Jaime Pinkham is automatically substituted for R.D. James, pursuant to Rule 25(d) of the
32 Federal Rules of Civil Procedure.

1 Pursuant to Local Rule 7-1, Defendants United States Environmental Protection
 2 Agency (“EPA”), EPA Administrator Michael Regan, United States Army Corps of Engineers,
 3 and Acting Assistant Secretary of the Army for Civil Works Jaime Pinkham (“Defendants” or
 4 “Agencies”) respectfully move to extend the existing stay until July 16, 2021—when the
 5 Agencies expect to file their motion for remand without vacatur—and to vacate all existing
 6 deadlines. Alternatively, the Agencies ask that the Court continue to stay the matter until the
 7 motion for remand is decided and to vacate all existing deadlines. While Plaintiffs² do not
 8 oppose the Agencies’ request for an extension of the stay, State Intervenor-Defendants³ oppose
 9 continuing the stay for the reasons set out in their prior briefing, but do not plan to file a
 10 separate response.

11 On April 16, 2021, this Court granted the Agencies’ opposed motion to stay this
 12 proceeding by 60 days and to continue existing litigation deadlines. Dkt. No. 241. The Court
 13 ordered the Parties to file a status report no later than June 10, 2021, requesting that the Parties
 14 update the Court regarding the “status of the Agencies’ review of the [Navigable Waters
 15 Protection Rule (“NWPR”), 85 Fed. Reg. 22,250 (Apr. 21, 2020)] and plans by any party to
 16 seek further stay of the litigation or enlargement of deadlines.” *Id.* at 2.

17 On June 10, 2021, the Parties filed a joint status report. Dkt. No. 244. The Agencies
 18 noted that, as a result of their review of the NWPR, the Agencies will initiate a new rulemaking
 19 to revise the definition of “waters of the United States.” *See id.* at 2-3 n.5 (citing
 20 <https://www.epa.gov/newsreleases/epa-army-announce-intent-revise-definition-wotus> (last
 21 accessed June 14, 2021)). As a result of this decision to initiate new rulemaking, the Agencies
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23 ² Plaintiffs are the States of California, New York, Connecticut, Illinois, Maine, Maryland,
 24 Michigan, New Jersey, New Mexico, North Carolina, Oregon, Rhode Island, Vermont,
 25 Washington and Wisconsin, the Commonwealths of Massachusetts and Virginia, the North
 26 Carolina Department of Environmental Quality, the District of Columbia, and the City of New
 27 York.
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³ State Intervenor-Defendants are the States of Georgia, West Virginia, Alabama, Alaska,
 Arkansas, Idaho, Indiana, Kansas, Kentucky, Louisiana, Mississippi, Missouri, Montana,
 Nebraska, North Dakota, Ohio, Oklahoma, South Carolina, South Dakota, Tennessee, Texas,
 Utah, and Wyoming.

1 also noted that they expect to file by no later than July 16, 2021 a motion to remand the NWPR
 2 without vacatur. Dkt. No. 244 at 3. The Agencies further stated that they were considering
 3 filing a motion to further stay the case and are seeking to vacate all existing deadlines. *Id.*

4 **I. There Is Good Cause to Stay the Litigation and to Vacate Existing Deadlines in
 5 this Proceeding.**

6 Now that the Agencies have decided on a new course of action and will soon initiate
 7 new rulemaking with respect to a regulation defining “waters of the United States,” there is
 8 good cause to stay the matter until at least July 16, 2021—the date by which the Agencies
 9 expect to file their motion for remand without vacatur—and to vacate all existing deadlines in
 10 the proceeding until the motion for remand is resolved. Alternatively, the Agencies ask that the
 11 Court continue to stay the matter until the motion for remand is decided. A district court “has
 12 broad discretion to stay proceedings as an incident to its power to control its own docket.”
 13 *Clinton v. Jones*, 520 U.S. 681, 683 (1997). The Agencies submit that the interests of judicial
 14 economy will best be served by allowing the Court the opportunity to consider and rule on the
 15 Agencies’ anticipated remand motion first before deciding whether any further filings are
 16 necessary or appropriate in this case.

17 Moreover, a short continuation of the stay will give the Parties time to formulate
 18 strategies and positions with respect to the Agencies’ intent to move for remand of the NWPR
 19 without potential disruption from other filings made in this proceeding. For example, under the
 20 current litigation order, the stay in the proceeding is scheduled to end on June 17, 2021 and
 21 amicus briefs are due July 1, 2021. Dkt. No. 241 at 1. Allowing the stay in this proceeding to
 22 lapse on June 17 would leave the door open for amicus parties to needlessly file briefs in
 23 support of or in opposition to the NWPR, which could ultimately be remanded back to the
 24 Agencies. And, to the extent the Parties want to oppose a proposed amicus party’s request to
 25 file a brief, the Parties will have to unnecessarily expend resources opposing those requests to
 26 file amicus briefs.

27 Vacating all existing deadlines in the proceeding also makes sense here. Given that the
 28 Agencies expect to initiate new rulemaking to revise or replace the NWPR, requiring the

1 Agencies to go through the scheduled briefing process may cause the Agencies to take
 2 positions that might appear to pre-judge issues that will be reconsidered through notice-and-
 3 comment rulemaking. And if the Agencies' motion for remand without vacatur is granted,
 4 briefing the merits of the NWPR will no longer be necessary. Accordingly, staying the
 5 proceeding until the Agencies file their motion for remand and vacating the existing briefing
 6 schedule would conserve the Court's and the Parties' limited resources and would best serve
 7 the interest of judicial economy.

8 **II. The Parties Would Be Prejudiced if the Agencies' Request Was Not Granted.**

9 The Agencies and the Parties would be prejudiced if the Agencies' motion was not
 10 granted. As noted above, requiring the Parties to continue litigating this suit when the Parties
 11 have decided to initiate new rulemaking that may ultimately revise or replace the NWPR
 12 would be an inefficient use of party and judicial resources. Moreover, as the Court previously
 13 noted, the State Intervenor-Defendants are not prejudiced by staying this litigation. *See* Dkt.
 14 No. 229 at 1. In granting the Agencies' first motion for a stay, the Court noted that "[b]ecause
 15 the challenged rule remains [in] effect, there is no undue prejudice to the Intervening States."
 16 *Id.* This will continue to be the case here, as the NWPR will remain in effect while the
 17 litigation is stayed.

18 **III. Conclusion.**

19 In conclusion, the Agencies have shown good cause for their request to further stay the
 20 proceeding until at least July 16, 2021 and to vacate all existing deadlines in the litigation. The
 21 Agencies respectfully request the following modification to the Court's prior order re-setting
 22 litigation deadlines (Dkt. No. 241):

- 23 • All existing deadlines currently calendared in this proceeding are hereby vacated.
- 24 • The above-captioned proceeding is further stayed until July 16, 2021 or, alternatively, until
 the Court's ruling on the Agencies' motion for remand without vacatur.
- 25 • The Agencies' motion for remand without vacatur is due July 16, 2021.
- 26 • The Parties shall meet and confer no later than 7 days from the date the Agencies' motion
 for remand without vacatur is decided by the Court. The Parties shall file separate or joint

1 proposals to further govern proceedings no later than 14 days from the date the Agencies'
2 motion for remand without vacatur is decided by the Court.

3 Dated: June 14, 2021

Respectfully submitted,

4 */s/Hubert T. Lee*
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